IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 622

THE DRAVO CONTRACTING COMPANY, a corporation, *Petitioner,*

v.

ERNEST K. JAMES, as an individual and as State Tax Commissioner of the State of West Virginia, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 223) is reported in 114 F. (2d) 242.

JURISDICTION

While Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347), would, as a discretionary matter, empower this Court to issue the writ as prayed for, we respectfully submit that no question is here presented calling for the issuance thereof.

FOREWORD

This Court being familiar with the procedural and factual matters surrounding this case (*James* v. *Dravo*, 302 U. S. 134), only such statements pertaining to the case and the facts as directly bear upon the questions presented will be included in this brief.

STATEMENT OF THE CASE

This case originating in the United States District Court for the Southern District of West Virginia was appealed to this Honorable Court from a decision restraining the Tax Commissioner of West Virginia from collecting any of the taxes involved. This Court reversed and remanded the cause to the District Court for proceedings in conformity with its written opinion (*James* v. *Dravo*, 302 U. S. 134).

The District Court, in its view not having sufficient evidence before it, ordered the taking of additional testimony. Petitioner then filed a motion for an injunction to prevent collection of any of the tax involved, and a three-Judge Court was assembled for the purpose of hearing said motion. After hearing, this application was denied on the grounds that all constitutional questions had been settled by this Court's opinion (R. 48). The District Court then made a purported allocation of the tax using as a basis the ratio which the cost incurred by petitioner inside West Virginia bore to the total cost and applied that ratio to the total gross income received by petitioner to fix the taxable income within West Virginia. This necessitated additional facts which were stipulated, all of which appear in the decree of the District Court (R. 49-74).

Both parties appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which Court

reversed the decree of the District Court, and remanded the cause with directions that the decree to be entered should enjoin the collection of only so much of the tax as might be applicable with respect to payments made upon delivery of materials and upon fabrication thereof at petitioner's plant outside West Virginia (R. 223-232; *Dravo Contracting Company* v. *James*, 114 F. [2d] 242). It is as to this judgment of the Circuit Court of Appeals that petitioner seeks the issuance of a writ of certiorari.

STATEMENT OF FACTS

The sole question before the District Court was that of allocating the tax in accordance with the former opinion of this Court (*James* v. *Dravo*, 302 U. S. 134). The material facts were settled by this Court in its former opinion. Additional evidence was afterward taken in the District Court (R. 107-220), but such was only an elaboration and to us a useless minute detailment of facts already in the record and recognized by this Court.

Petitioner is a Pennsylvania corporation with its principal office and plant at Pittsburgh in that State, and is admitted to do business in West Virginia. During the years 1932-1933 it entered into four contracts with the Federal Government for the erection of certain locks and dams on and along the Kanawha River and certain locks on and along the Ohio River, all within the territorial limits of West Virginia. The gross sales and income tax law of West Virginia provides for annual privilege taxes on account of business and other activities, the particular clause here in question being as follows: "upon every person engaged or continuing within this State in the business of contracting, the tax shall be equal to two per cent of the gross income of the business". (Code of West Virginia, 1931, Chapter 11, Article 13, as amended by Acts of 1933, Chapter 33.) Prior to May 27, 1933, the tax was three-tenths of one per cent (R. 23-48).

A substantial part of the work performed under these contracts took place at petitioner's plant at Pittsburgh. Petitioner purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, hoisting mechanism and equipment under each of its contracts and fabricated the same at its Pittsburgh plant. The roller gates and the appurtenant equipment were preassembled at petitioner's shops at Pittsburgh, and were there inspected and tested by officers of the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery and the appropriate units as prepared for shipment were then transported by petitioner to the designated sites in West Virginia, and there installed. The United States knew at the time the contracts were made that the above described work was to be performed at petitioner's plant in Pittsburgh. The contracts provided for partial payments as the work progressed and that all such material and work covered by the partial payments should thereupon become "the sole property of the Government." Payments by the Government were made from time to time accordingly. Petitioner knew from the contracts and the invitations to bid as to these payments, the amounts thereof, the time when they would be made and the purposes for which made. See *James* v. *Dravo*, 302 U. S. 134, 139. The payments made for the work just mentioned is that with respect to which the Circuit Court, in full compliance, we believe, with this Court's opinion, declared to be exempt from taxation (R. 223-232). The payments just mentioned, as well as other payments made upon delivery at the work site and incorporation in the structures in West Virginia in strict accordance with the contracts, are set forth in detail in the deposition of C. A. Hill (R. 176-179). The original stipulation of facts specifically

states that the partial payments made by the United States with respect to said materials delivered and work done at Pittsburgh were made for the materials and for the manufactured or fabricated articles (R. 97). Title passed upon such payments.

In the District Court, petitioner produced evidence to the effect that the partial payments did not cover the cost of the particular activity or operation with respect especially to fabrication at Pittsburgh. Furthermore, that the partial payments made with respect to delivery of materials at the work site and the incorporation of fabricated and unfabricated materials into the structures did not correspond to the cost of operations at those particular places, exceeding the same. It is apparent, however, that the partial payments were not meant to cover costs, but were made with respect to the value the Government placed upon the particular operation or activity involved (R. 137-140). At all events, the partial payments which were made for certain specified operations or performances at Pittsburgh and at the dam site were those which petitioner solemnly, in its contract with the Government, agreed to take therefor.

PETITIONER'S SPECIFICATION OF ERRORS

Petitioner specifies that the Circuit Court of Appeals erred in the following particulars:

I

In directing that an apportionment of petitioner's income should be made on the basis of the place of occurrence of the activities upon which payments were made.

II

In refusing to enjoin the collection of the entire tax.

SUMMARY OF ARGUMENT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN STRICT ACCORDANCE WITH THE DECISION OF THIS HONORABLE COURT UPON THE FORMER APPEAL AND IN NOWISE CONFLICTS WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

James v. *Dravo*, 302 U. S. 134;

Dravo v. *James*, 114 F. (2d) 242;

Western Livestock v. *Bureau of Revenue*, 303 U. S. 250;

American Manufacturing Company v. *St. Louis*, 250 U. S. 459;

Equitable Life Assurance Society v. *Pennsylvania*, 238 U. S. 143;

McGoldrick v. *Berwind-White*, 309 U. S. 33;

Graybar Electric Company v. *Curry*, 238 Ala. 116, 189 So. 186; 308 U. S. 513.

ARGUMENT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN STRICT ACCORDANCE WITH THE DECISION OF THIS HONORABLE COURT UPON THE FORMER APPEAL.

The question here involved relates solely to territorial jurisdiction to tax. This Honorable Court has already dealt squarely with that problem, and has succinctly and clearly provided its solution (*James* v. *Dravo*, 302 U. S. 134). After this Court's former decision the

matter of apportionment became purely one of little more than mathematical calculation. The Circuit Court of Appeals had no seeming difficulty in following the direction of this Court in making the apportionment. In *James* v. *Dravo*, 302 U. S. 134, this Court said (page 138):

> "The questions presented are (1) whether the State had territorial jurisdiction to impose the tax * * *."

The Court then discusses the matter of territorial jurisdiction and says (page 138):

> "*First*—As to territorial jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia the State had no jurisdiction to impose the tax. * * * The question has two aspects (1) as to work alleged to have been done outside the exterior limits of West Virginia * * *."

The opinion then specifically describes the activities which have just been declared to be non-taxable as a matter of territorial jurisdiction in the following language (p. 139):

> "1. A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, hoisting mechanism and equipment, under each of its contracts, and fabricated the same at its Pittsburgh plant. The roller gates and the appurtenant equipment were preassembled at respondent's shops at Pittsburgh and were there inspected and tested by officers of

> the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery, and the appropriate units as prepared for shipment were then transported by respondent to the designated sites in West Virginia and there installed. The United States knew at the time the contracts were made that the above described work was to be performed at the plaintiff's main plant. The contracts provided for partial payments as the work progressed and that all the material and work covered by the partial payments should thereupon become 'the sole property of the Government.' Payments by the Government were made from time to time accordingly.
>
> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State and an apportionment would in any event be necessary to limit the tax accordingly. * * *"

The Circuit Court of Appeals faithfully followed the direction of this Court. It concluded that when this Court said, "this work done in Pennsylvania" was to be exempt from taxation, that this Court referred beyond question to the "work" it had described as being exempt from taxation, and having these descriptive elements: (1) work with respect to the acquirement of materials to be fabricated and the fabrication thereof at Neville Island; (2) work which the United States knew at the time the contracts were made was to be performed at Neville Island; (3) work for which partial payments were there made as work progressed, and (4) work which

upon said partial payments being made therefor became "the sole property of the Government." In other words, "work" which when performed completed a contractual undertaking carried on and consummated entirely outside West Virginia. The taxable privilege had been performed outside the taxing State.

Therefore, when this matter was presented to the Circuit Court of Appeals, its duty was plain under the opinion of this Honorable Court, and it proceeded to discharge that duty by saying that the exemption as to taxation related only to the "work" which this Court had described as being exempt from taxation, and hence the agreed and paid income which petitioner received from the Federal Government for that work in the form of partial payments whereupon said work became "the sole property of the Government" was the only income petitioner might justly claim as exempt from taxation. This is the position we have consistently maintained since the decision of this Court and one which the Circuit Court of Appeals reached without seeming difficulty.

If there were other classes of exempt income this Honorable Court would have said so. It dealt with all the other phases of territorial jurisdiction and specifically ruled in favor of the State with respect thereto. This Court laid down the rules and principles by which this tax was to be allocated and the Circuit Court of Appeals followed those rules and observed those principles.

THE TAXABLE ACTIVITY

Counsel for petitioner (petitioner's brief 18-21) seems confused in the meaning and use of the word "activity" by this Court and the Circuit Court of Appeals. It is argued that this Court meant that if any activity, no matter what it was, how small or how large, took place

outside West Virginia that some portion of some income must be allocated to that activity and thus rendered nontaxable. This Court described the activities it had reference to as bearing certain descriptive elements hereinbefore referred to. May we observe how well this Court's description of those exempted activities fits into the taxing statute here involved and its purpose. The tax is upon the business or privilege of contracting in the State of West Virginia. A construction contract was to be performed. It was to be a completed job in West Virginia. Contracting may involve various and sundry activities, but the ultimate object is a completed building or structure. Going back to this Court's description of the activities or the work declared by it to be exempt, we find beyond peradventure of doubt that that activity or that work in itself constituted a completed contract. In other words, the delivery of materials for fabrication and the fabrication thereof in Pittsburgh was a completed transaction within the terms and meaning of the contract with respect thereto. The business of contracting, the privilege of contracting, with respect to that work or that activity had taken place in Pennsylvania and not in West Virginia. Hence, West Virginia had no power to tax because the very privilege it sought to tax had been exercised outside its territorial boundaries. It was there that the parties specified the work was to be performed. It was there inspected by the Government, and finally it was there paid for and title then passed to the Government. It became a completed, separate and severable contract or operation contemplated by the main contracts. So, it is our view, as also was it of the Circuit Court of Appeals, that when this Honorable Court spoke of activities being exempt it meant the activities it had described; that it meant the activity or the privilege of contracting insofar as that had been performed elsewhere than in West Virginia.

It was as to this completed work, as to this complete performance of a separate function under the main contracts that this Court said the income therefrom should not be taxed. Income, if it please the Court, in the form of so called partial payments upon receipt of which title passed to the Government, thus completing the transaction for every practical intent and purpose.

Petitioner further urges (pages 21-22, petitioner's brief) that the decision of the Circuit Court of Appeals allows certain income declared exempt by this Court to be taxed one hundred per cent. Again petitioner is confused in the use of the word "activities." Petitioner states that under three of the four contracts an item such as structural steel was fabricated at Pittsburgh, and no partial payments being provided in the contract with respect thereto, payment being made only upon delivery and incorporation at the work site, that it having performed activities as to such structural steel outside of West Virginia, the decision of the Circuit Court allows the income therefrom to be taxed one hundred per cent when it should be exempted. The fallacy of this argument is at once apparent. The petitioner in its contract did not contract to do this work in Pennsylvania; it did not contract to have it inspected in Pennsylvania; it did not contract that it should be paid for in Pennsylvania; and it did not contract that title thereto should pass to the Government upon such payment in Pennsylvania. It is true that petitioner performed some work with respect thereto outside of West Virginia, but it did not complete a contract with respect thereto, but its completed contract relative to these articles was consummated in West Virginia, the taxable jurisdiction. There the taxable activity took place and not in Pennsylvania. This argument is true with respect to some other articles, such as lock gates, cranes and patterns which petitioner refers to.

This Court cannot but recognize that it is economically inevitable that some material and equipment in the performance of almost any contract or work must be obtained from places outside the taxing State. The procurement of such materials and equipment, of course, represents a form of activity carried on beyond the taxing State. Yet their cost may enter into and make up part of the gross income which the contractor receives. The contractor is taxed for the privilege of carrying on a contracting business which is the building of a structure rather than the procurement of the necessary materials and equipment, and a tax with respect thereto is valid even though it may involve activities outside the taxing State. *Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250; *American Manufacturing Company* v. *St. Louis*, 250 U. S. 459; *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143. As said by the Circuit Court of Appeals, *Dravo Contracting Company* v. *James*, 114 F. (2d) 242, at page 246:

> "The fact that the contractor may have prepared materials in other states for use under the contract is immaterial, if they were used in the performance of the contract in West Virginia and payments made the contractor were dependent upon such use."

It is further argued (petitioner's brief, 22-25) that the income represented by partial payments upon delivery of certain materials and fabrication thereof at Pittsburgh, specifically mentioned and declared by this Court and the Circuit Court of Appeals to be exempt from taxation, does not go far enough inasmuch as those partial payments do not cover the cost to petitioner of the specific work performed. It is asserted that testimony shows that at least eighty per cent of the unit price of the articles there fabricated was represented by the cost of such ma-

terial and fabrication outside West Virginia, while the partial payments made therefor would amount to only sixty or sixty-five per cent of the cost of the work there performed. Petitioner loses sight of the fact that it solemnly agreed in its contract with the Federal Government to take a certain amount represented by specific partial payments for this completed work in Pennsylvania, whereupon "title passed to the Government," thus completing the contract with respect to that particular phase of the work. Petitioner's Vice-President, Mr. Miller, states that there was no relationship between partial payments and actual value. Nevertheless, his Company agreed to take so much for certain work, whereupon complete title passed. Surely there was some relationship between the payments made and the value. What evidently was meant was that the payments made did not fully reimburse for the cost of these materials and the fabrication carried on in Pittsburgh, but this Court can readily recognize that a roller gate, or a lock gate, or a piece of a dam, sitting in the shops or in the yard of Petitioner in Pennsylvania is not there worth its cost, because it is intended for use in West Virginia in a dam or in a lock where it there assumes a value even above the actual cost of installation.

The above argument is applicable as well to other articles and instances cited in petitioner's brief.

RECENT DECISIONS OF THIS COURT

Fault is found with the opinion of the Circuit Court of Appeals (petitioner's brief, 29-32) in its likening the present case and the principles involved to those discussed and laid down by this Court in certain recent decisions dealing with gross sales taxes, especially *McGoldrick* v. *Berwind-White,* 309 U. S. 33. The principle of the right of a State to tax with respect to a taxable event occurring in

the State is without question even though many extra-state activities and interstate commerce may have been involved prior to the happening of the taxable event, or exercise of the taxable privilege. In this case the taxable event, so to speak, or the taxable privilege, is that of contracting; that of completing a contract. This Court, as well as the Circuit Court of Appeals, has said that where such takes place, as in the case of certain fabrication of materials outside of West Virginia, thus completely performing a certain phase of the contract, and for which full payment is made and title passes, that West Virginia may not tax; but with respect to the other work or the other activity of petitioner, such was not completed until the taxing jurisdiction of West Virginia had been invaded and the taxable event or taxable activity took place in that jurisdiction. See also in this connection *Graybar Electric Company* v. *Curry*, 238 Ala. 116, 189 So. 186; 308 U. S. 513. This Court, in *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, page 337, pointed out that the opinion in the *Dravo* case exempted from taxation the work done in other states for which the contractor was paid in other states. In other words, a contractual undertaking entirely completed outside the jurisdiction of the taxing state—paid for, title had passed.

REFUSAL TO ENJOIN THE COLLECTION OF THE ENTIRE TAX

It is argued (petitioner's brief, 36-38) that no apportionment whatsoever can be made and that the collection of the entire tax should be enjoined. If this argument be sound under the circumstances and facts of this particular case then this Court indeed ordered a vain and empty thing when it directed that the case be remanded to the District Court for an apportionment in accordance with this Court's opinion. We do not attribute to this Court idle gestures of this sort. This Court considered the taxing statute here involved and

all the facts of the case were before it. If the statute was such which under the particular facts here involved an apportionment could not have been made, this Court, in our humble judgment, would have said so. The Circuit Court of Appeals aptly observed that this question was expressly raised in this Court and by the action of this Court in remanding the cause such was decided in favor of the State. *Dravo* v. *James*, 114 F. (2d) 242, 245.

CONCLUSION

We, therefore, respectfully submit that the decision of the Circuit Court of Appeals is not in conflict with the applicable decisions of this Court, and particularly not in conflict with the decision of this Court heretofore made in this case; further, that none of the grounds referred to in Section 5, Rule 38, of this Court, indicating the character of reasons which this Court will consider in awarding a writ of certiorari are here presented, our belief being that the Circuit Court of Appeals followed with particularity the principles enunciated and the direction made by this Honorable Court in its prior opinion in this case.

Wherefore, it is submitted that the writ of certiorari as prayed for should be promptly denied by this Honorable Court.

Respectfully submitted,

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